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87-220

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

CITY OF SANTA BARBARA,

Petitioner,

v.

WILLIAMS C. HALL, and
JEAN G. HALL,

Respondents.

No. —

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION OF GOLDEN STATE MOBILHOME OWNERS LEAGUE, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE

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EDITOR'S NOTE

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Pursuant to Rule 42(3) of the Rules of this Court, Golden State Mobilehome Owners League, Inc. respectfully moves the Court for leave to file a brief amicus curiae in the above entitled case. Counsel for petitioner has granted consent; the respondents have refused to consent.

INTEREST OF GOLDEN STATE MOBILHOME OWNERS LEAGUE,INC.

Golden State Mobilhome Owners League, Inc. ("League") is an organization composed of mobilehome and manufactured home owners. Founded 25 years ago, it represents more than 200,000 persons living in 100,000 manufactured homes in the State of California, making it one of the oldest and largest non-profit homeowners organizations in the United States.

To date in this matter the homeowners have had no voice at all. The residents in Respondents' park were not even aware of this action until the Court of Appeals decision was published, according to members and officers of the League in that area. It is indicative of Respondents' attempt to deny their residents any input that even consent to file this brief on their behalf was denied, when requested by this counsel.

It is documented by state records of sales that more than one million mobile and manufactured homes are occupied as permanent residences in the State of California today, with about 40% of them located on rented or leased sites, often in "parks". The homeowners, with investments in home, accessory structures and landscaping totaling $25,000 to $75,000 each, are peculiarly at the mercy of the park owners. The larger size homes, common in recent years, are nearly as expensive to move as site-built buildings and there are few available spaces for them to relocate. Restrictive zoning and denial of permits for construction of new parks have resulted in vacancy factors of less than 2% in most urban areas. The lack of spaces has caused the value of lands developed as parks and hence, their rental rates, to be artificially high.[1] Therefore, the League has a very real and direct interest in the instant case since it has been in support of local ordinances regulating the rate of rent increases.

The substantial and far-reaching consequences this decision of the Ninth Circuit may have on all methods of rent restriction are already quite evident. Owners of park after park are giving notices of rent increases in excess of previous limits, daring the residents to

1. See generally *Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside,* (1984) 157 Cal.App.3d 887, 900.

object or file suits which will give the landowners excuse to challenge the ordinances. The League is extremely concerned that as a result of this decision the fifty-six jurisdictions in California which have to date passed rent ordinances may be subjected to massive lawsuits, necessitating the expenditure of thousands of dollars in tax monies to defend. Three such suits have already been filed to this writer's knowledge and are particularly burdensome for small towns to defend. Thus, all taxpayers are being affected, not just mobilehome owners.

Further, the League has a direct interest in the clarification by this Court of the line constituting a "taking" under the Bill of Rights since its staff and counsel are frequently called upon for input to assist state and local elected and appointed officials. League representatives over the years have attended thousands of meetings of legislative, county and municipal committees to support passage of fair laws to create and maintain the mobilehome/manufactured home lifestyle. That history of participation makes the League uniquely able to present to this Court the many, but sometimes hard to locate, mobilehome laws which it feels have a direct bearing in the instant matter.

CONCLUSION

For the above stated reasons, Golden State Mobilhome Owners League, Inc. respectfully requests that the Court grant this motion for leave to file the accompanying Amicus Curiae brief in support of the position of the petitioner.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I, PATRICEA L. DEAN, the attorney for Golden State Mobilhome Owners League, Inc., Amicus Curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on August 3, 1987, I served copies of the foregoing MOTION OF GOLDEN STATE MOBILHOME OWNERS LEAGUE, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF OF AMICUS CURIAE on the several parties thereto, as follows:

1. On the City of Santa Barbara, Petitioner, by mailing three copies in a duly addressed envelope, with first-class postage prepaid, to its attorney of record, Steven A. Amerikaner, City Attorney, Post Office Drawer P-P, Santa Barbara, California 93102.

2. On Williams C. Hall and Jean G. Hall, Respondents, by mailing three copies in a duly addressed envelope, with first-class postage prepaid, to their attorney, Sherman L. Stacy, Esq. 1299 Ocean Avenue, Suite 313, Santa Monica, California 90401.

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ARGUMENT

INTRODUCTION

The people of the nation, desperate for shelter during World War II, discovered "trailers" and increased demand after the war caused the creation of a whole new industry - mobile housing. There has never been a particular area of law where this new creation could be pigeon-holed. This sometimes-mobile, sometimes-stationary housing which is usually personalty but may be realty has had to carve its place between areas of law until it seems, like Topsy, to have "just growed." Some knowledge of its history and background are necessary to understand its present position and problems.

The State of California in the mid-1950's was one of the first to establish codes of building standards for such housing[1] and for site development.[2] In 1969 California, along with other states, began to recognize that the rights of mobilehome owners were greater than those of other types of "renters" so the first of the Mobilehome Residency Laws[3] was enacted. Also the widening gap between mobilehomes (now given recognition as a type and spelled as a single word) and recreational trailers ("RV's") was emphasized with the passage of the Recreational Vehicle Park Occupancy Act[4] and continuing amendments which kept enlarging the differences between the two parts of the industry.

Design improvements, improved materials and particularly the affordable price of mobilehomes during the Seventies, when inflation skyrocketed the price of site-built homes, brought ever-increasing numbers of buyers and made necessary the development of a national building standard. In 1974 Congress enacted the National Mobilehome Construction and Safety Standards Act, later amended to the National Manufactured Home Construction and Safety Standards Act.[5] Considered by many engineers to be comparable to the Uniform Building Code or the Southern Building Code, the code promulgated by the Department of Housing and Urban Development (the "HUD Code") became effective in 1976 and all mobile/manufactured homes built since June 15, 1976 are constructed to the new standards, which led to R-1 zoning under California Government Code §65852.3

The problems that have consistently plagued the industry, the governments, the courts and the manufactured home owners since that date have been aggravated by a combination of "poor image" and "confusing terminology."

I

FAILURE TO UNDERSTAND EXACTLY WHAT TYPE OF HOUSING UNIT IS IN ISSUE OR THE PROPER TERMINOLOGY CAN LEAD TO MISTAKES OF FACT

The manufactured housing industry and the law have been hard put to devise terminology and definitions for this relatively new creation of technology. For example, the difference between a mobilehome (one built to state standards before 1976) and a manufactured *home* (one built to the HUD Code) and a manufactured *house,* also called a "modular," (one built to the Uniform Building Code designed for a permanent foundation only) might be absolutely crucial in trying to interpret a zoning ordinance.

Similarly, knowing a mobilehome/manufactured home is a "structure" under both federal[6] and state[7] laws, can be homesteaded[8] and is no longer exempt from a real estate type tax[9] would be necessary to properly interpret the provisions of the Santa Barbara ordinance at issue.

Unfortunately, the Court herein in the detailing of Facts[10] provides an example of the mistakes of law and fact which can occur. In the first paragraph,[10] and throughout the statement of facts and the entire opinion, the use of the word "tenant" seems to indicate a lack of understanding of the estate held by a mobilehome owner. More than five years ago the California legislature decreed the term "resident" to be used in the Residency Law as expression of an estate greater than a simple rental tenancy.

In the second paragraph of Facts,[10] the Court speaks of "motor vehicle license plates," but the cited section of the Vehicle Code does not apply to mobile/manufactured homes at all, only to

RV's.[11] Also in the second paragraph, §5810 (Cal. Rev. & Tax. Code §5800, et seq.) is misstated in that, when read with §§5800 and 5801, it is clear mobilehomes *are* taxed as if real property and are not exempt.

Therefore, it seems these mistakes would not have occurred unless the panel had the image or "mindset" that they were dealing with "trailers" which were licensed and taxed like motor vehicles and occupying transient rented spaces. That mistake of "image" is evident throughout the opinion and taints the decision with additional confusion. It is probable that the same mistake accounts for the Court's acceptance of the argument that the Kelley Blue Book "Like the similar blue book for automobiles"[12] is the standard reference for prices. That reference is only applicable to the *home* itself and takes into consideration the age, manufacturer and model. It fails to recognize any value for accessories, (the skirting around the base, carports, porches, patios, storage buildings, etc.) which may be minimal at only $8000 to $10000, or may involve full mortored-stone bases, poured concrete porches and steps, and site-built garages at a cost of $40,000 to $50,000. Similarly, it provides no assistance in the consideration of location . . . location in the sense of on the desert in Palmdale or near the beach in Santa Barbara, or in the "old, bad" part of a town or in the "newer, good" part of a popular city. Therefore, a blue book value of $30,000 for a home is only the starting point to determine its sales value. The market for housing in general in the area must also be considered. Housing in Santa Barbara is at a premium averaging more than $120,000, so a manufactured home in that area selling at $60,000 to $80,000 is considered a bargain with no weight given to rent control at all.

It is likely that the same mistake of "image" led to the Court's almost summarily dismissing the statement of findings and purpose in the ordinance[13] without recognizing the City Council's authorization and duty to make such perceptions.[14]

It is well established that a state is justified in declaring "a broad remedial purpose in protecting the mental and physical health of citizens who could suffer greatly by evictions."[15] In the instant matter the state and city, in declaring protection for the economic health of the citizens as well, have found the protected estate of the manufactured home owner necessary to prevent the

disastrous consequences of either actual eviction without just cause or economic eviction by uncontrolled and massive site rent increases.

II

THE COURT'S CONCLUSIONS ON THE OPERATIVE EFFECT OF THE ORDINANCE FAIL TO TAKE NOTICE OF STATE LAW.

The Court appears to conclude[16] the *ordinance* is solely responsible for requirements there must be offered "a lease, a recognized estate in land," without considering that "A lease is a rental agreement." (Cal. Civ. Code §798.8) which "shall be in writing" with specific provisions including a term (id. at §798.15) and manditorily must be offered to the homeowner (id. at §798.18). Further, the Court details other requirements[17] such as "terminable by the resident at will" (see id. at §798.59) "but by the parkowner only for cause, narrowly defined in the ordinance" without apparent regard for statutory provisions. (id. at §798.56 (a) through (f)(5).) In other words, the ordinance does not expand in any way the estate of the resident declared and granted by the legislature years ago which statutes are not under attack herein! The Court ignores the fact that plaintiffs made the choice to use their land as a mobilehome park knowing of the substantial rights of the residents that would apply under these state laws already then in existence.

The Court continues,[18] "lasting indefinitely" and having "a market value"[19] without taking notice, it seems, of the ban against unilateral assignment on the face of the ordinance[20] which effectively prevents the resident from taking any benefit from the gift or sale of the "estate" without the express agreement of the parkowner. More importantly, the Court apparently failed to note that the estate is terminable by the parkowner under both the ordinance[21] and statute (Civ.Code §798.56 c.) for failure to obey "rules and regulations of the park" which may be, and usually are

unilaterally imposed, strengthened and modified by the parkowner over all objections of the residents simply by giving of the required six months' notice. (id. at §798.25) Therefore, it may be seen that the so-called estate of the resident can be somewhat illusory under some parkowners. The ordinance and even the statutes give only a surface sheen which tends to conceal the possibilities for harassment, deliberate infliction of stress and threats, and perpetration of unfair business practices against the residents once they are "locked in place" by the lack of available spaces and the approximate expense of $10,000 to $12.000 to disassemble, move and reinstall a double-section home even a short distance. It is a situation which is giving rise to an ever-increasing number of actions in state courts,[22] which, it might be assumed, the city herein hoped to defuse by providing for leases requiring some arbitration.

The Court then concludes the landlord "loses practically all right to decide who occupies the property, and on what terms."[23] and that the homeowner "is given an economic interest in the land that he can use, sell, or give away at his pleasure; . . . to keep or use, whether or not he continues to be a tenant."[24] This writer can find no legal basis for either argument. To make such conclusions one must ignore at least two provisions of the subject ordinance and four statutory restrictions. Under the ordinance the parkowner need only deny assignment[25] to invoke all his statutory rights to a satisfactory credit statement and determination that the occupant has the ability to pay rent (Cal. Civ. Code §798.74); will comply with the rules (id. at §798.74) including any barring children (id. at §798.76); and executes a rental agreement with whatever terms, other than the rental rate as increased upon transfer,[26] the parkowner demands (id. at §798.75) since neither the protections of the ordinance nor the Residency Law in the Civil Code are available to a new buyer not yet living in the park. Both documents fail to define or provide for this person who is not yet either a "homeowner" or "resident." The prospective purchaser is faced with a take-it-or-leave-it situation which usually results in a loss of the sale to the homeowner's detriment but no loss of revenue to the parkowner.

For all the above reasons, to conclude "the tenant alone decides who will be his successor" and "the landlord has no meaningful say as to who will live on the property"[27] is a travesty.

III

PLAINTIFFS' ALLEGATIONS SHOULD NOT BE TAKEN AT FULL VALUE IF CONTRARY TO LAW.

A standard rule of procedure requires a reviewing court to assume all of plaintiffs' allegations are true. However, this writer has been unable to find any authority whatsoever that the Court must give full consideration to an allegation that is contrary to law. For example, to take an allegation which the Court itself cites,[28] "this interest consists of the right to occupy the property in perpetuity . . . " is very hard to justify. As noted above, the ordinance itself provides the leases shall not be assignable without the express permission of the parkowner. Therefore, the right to occupy may not be willed, nor given away, nor indeed sold wthout the consent of the parkowner. Further, under statutory law specifically included in the municipal code,[29] as soon as the home is 25 years old and fails to pass inspection or if it is in disrepair or in "significantly rundown condition" regardless of age the parkowner does not have to consent to any transfer of the home whatsoever.[30] Thus, an allegation of an estate "in perpetuity" appears to be contrary to law.

It should also be noted that the resident has no right to request a transfer of the occupancy rights *without the home.* All of his occupancy rights arise from his substantial investment in the home, accessories and landscaping which he has installed on the property. It is the investment which he is putting on the market, not just the right to occupy. The total investment by the 71 residents in their homes, accessories and landscaping on the surface of the property probably exceeds the total investment the parkowners have in the land since that pattern has been established over and over in hearings and trials.

Again it appears the Court has confused the terminology or failed to take notice of the substantial differences in the "residency" rights of a manufactured home owner as compared to the type of apartment rentals which are the usual concern in a rent control matter.[31] The listing of prerogatives which apply to the

"ordinary" rentals of housing help point out the differences the Court should have been considering herein. Most of the parks have written rules already in place regulating whether pets are allowed, establishing the park as either "family", "adult", or "senior", usually limiting two residents per home and making the resident responsible for all landscaping. Therefore, there are few improvements possible on a bare lot which could increase rents and if the resident is a "slovenly beer-drinker" he can be evicted.[32]

IV

REQUIREMENTS TO MAKE HOUSING A TOP PRIORITY CONSTITUTE A LEGITIMATE STATE INTEREST

The ever-increasing numbers of homeless in California, among them being whole families, have caused national headlines. Years ago the legislature declared "the availability of housing is of vital statewide importance" and "a priority of the highest order."[33] Additionally, even more strigent requirements have been determined for local governments within the coastal zone, to preserve, protect and replace low-income and moderate-income housing.[34] As previously noted herein, mobilehomes at $60,000 qualify as moderate and/or affordable housing in areas such as California's coastal zone where the average selling price of site-built homes is $10,000 to $20,000 more than the average for the rest of the state, that is, in the $120,000-130,000 range or more. The City Council, after investigations by staff and public hearings, duly found "a critical shortage of low and moderate income housing" in their area, and that the parks for mobilehomes and recreational vehicles "are a significant part of the remaining supply."[35] The Council recognized the economic burden on the homeowners[36] but insisted the parkowners have a "fair return on their investment."[37] The ordinance makes arbitration of the lease terms themselves binding[38] but says the arbitration provision of the leases only includes those items, besides rent increases in excess of the ordinance, "which the *parties agree* to subject to arbitration."[39] When viewed in connection with the stated purposes of the directives for a housing element by the legislature and with the details of the

California Mobilehome Residency Law, the Council actually has developed a scheme of action which has given weight to the requirements of all concerned in the forwarding of not only a legitimate but critical state purpose.

CONCLUSION

The Golden State Mobilhome Owners League, Inc. concurs in the statement of jurisdiction, the questions presented and, generally, with the argument advanced by the City of Santa Barbara in its petition herein. However, beyond those points the League believes the Court below failed to take the time to adequately study and understand the special legal problems presented by this type of housing.

The League respectfully submits the Court below, once it decided to ignore the "ripeness" issue, had the opportunity to review the "novel" differences presented by manufactured homes to traditional concepts in law and instead chose to ignore those differences in favor of developing its own "novel" concept of the tradition itself.

The League respectfully requests this Court grant the petition for writ of certiorari in view of the many conflicts in this decision between both state laws and federal decisions.

Respectfully submitted,

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Attorney for Amici Curiae
Golden State Mobilhome Owners
League, Inc.

FOOTNOTES

1. Currently at Cal. Health & Safety Code §18000, et seq.
2. Currently at Cal. Health & Safety Code §18200, et seq.
3. See legislative declarations of need for special protections in Cal. Health & Safety Code §18250 and Cal. Civ. Code §798, et seq., particularly §798.55(a).
4. Cal. Civil Code §799.20, et seq.
5. 42 U.S.C. §5401, et seq.
6. 42 U.S.C.A. §5402(6)
7. Cal. Health & Safety Code §18007, 18008, and 18211
8. Cal. Civ. Proc. Code §704.910
9. Cal. Health & Safety Code §18075.5 (a); See also Cal. Rev. & Tax. Code §5801
10. Amended decision herein, (1987) --- F.2d ---, typed copy attached as Appendix 2, Facts at pg. 2.
11. Vehicle Code has not applied to mobilehomes since 1981.
12. App. 2, pg. 4, note 5
13. App. 1, pg. 2, §26.08.020 A through D
14. See Cal. Govt. Code 65580, et seq.
15. *Troy Ltd. v. Renna,* (1984) 727 F.2d 287, 298.
16. App. 2, pg. 2, ln. 24; also pg. 3, ln. 9; also pg. 10, lns. 4 & 5.
17. App. 2, pg. 3, lns. 1 & 2
18. App. 2, pg. 10, ln. 6; also pg. 11, lns.1-4.
19. App. 2, pg. 10, lns. 14-26 through pg. 11, ln. 7 together with pgs. 15-17 mentioned therein.
20. App. 1, pg. 7, §26.08.040 E.
21. App. 1, pg. 4, §26.08.040 A3
22. To this author's knowledge, more than thirty cases have been filed in the state courts alleging these causes of action against parkowners.
23. App. 2, pg. 10, lns. 7-9.
24. App. 2, pg. 11, lns. 1-4.
25. App. 1, pg. 7, §26.08.040 E.
26. App. 1, pg. 8, §26.08.060.
27. App. 2, pg.10, lns. 9-12.
28. App. 2, pg. 9, ln. 9.
29. App. 1. pg. 1, §26.04.010.
30. Cal. Civ. Code §798.73.

FOOTNOTES

Continued

31. App. 2, pg. 16, ln. 12 through pg. 17, ln. 4.
32. Cal. Civ. Code §798.56b.
33. Cal. Govt. Code §65580(a).
34. Cal. Govt. Code §65590, et seq.
35. App. 1, pg. 2, §26.08.020 A & B
36. App. 1, pg. 2, §26.08.020 C
37. App. 1, pg. 2, §26.08.020 D
38. App. 1, pg. 7, §26.08.050 C
39. App. 1, pg. 5, §26.08.040 D ii.

APPENDIX

TITLE 26

HOUSING REGULATIONS

Chapter: 26.04 Mobilehome and Recreational Vehicle Parks-Resident Rights

Chapter: 26.08 Mobilehome and Recreational Vehicle Park Lease Regulations

Chapter 26.04

MOBILEHOME AND RECREATIONAL VEHICLE PARKS - RESIDENT RIGHTS

Sections:

26.04.010 Mobilehome and Recreational Vehicle Parks-Residents Rights.

26.04.010 Mobilehome and Recreational Vehicle Parks-Residents Rights

All tenancies in any mobilehome or permanent recreational vehicle park (as defined in Title 28) within the City of Santa Barbara existing on the effective date of the ordinance adopting this Section or created thereafter shall be protected by the provisions of Chapter 2.5 (Sections 798 through 799.6) of the California Civil Code regardless of whether said park is registered with the State of California as a "mobilehome park" or a "recreational vehicle park." (Ord. 4269, 1984.)

Chapter 26.08

MOBILEHOME AND RECREATIONAL VEHICLE PARK LEASE REGULATION

Sections:

26.08.010 Short Title.
26.08.020 Findings and Purpose.
26.08.030 Definitions.
26.08.035 Exemptions.
26.08.050 Lease Negotiation; Arbitration.
26.08.060 Rent Increase upon Transfer of ownership.
26.08.070 Notices by Park Owner.
26.08.080 Enforcement

26.08.010 Short Title.

Chapter 26.08 of Title 26 of the Santa Barbara Municipal Code may be cited as the "Mobilehome and Recreational Vehicle Park Lease Ordinance of the City of Santa Barbara." (Ord. 4285, 1984.)

26.08.020 Findings and Purpose.

A. The City Council finds and determines that there is a critical shortage of low and moderate income housing within the City and on the south coast of Santa Barbara County.

B. The City Council further finds and determines that mobilehome parks and recreational vehicle parks (also known as trailer parks) are a significant part of the remaining supply of low and moderate income housing in the City, and are frequently occupied by residents on a permanent basis. Many of the residents of these facilities are senior citizens on fixed incomes or other persons with limited economic means.

C. The City Council further finds and determines that rent increases in mobilehome and recreational vehicle parks represent a significant threat to the continued ability of park residents to afford to maintain residency in such parks. The economic impact of unaffordable rent increases on park residents is much more severe than rent increases on other tenants inasmuch as many park residents own their mobilehomes, recreational vehicles or trailers and, if forced to move because of rent increases, must bear the additional and substantial burden of paying to move those vehicles or mobilehomes to another site. There are very few places on the south coast of Santa Barbara County to which such mobilehomes or vehicles can be moved.

D. The purpose of this ordinance is therefore to regulate the rent charged for mobilehome and recreational vehicle spaces used on a permanent basis to prevent severe and inordinate rent increases, to protect certain persons of limited economic means from the disruption and expense of relocation and to provide increased certainty to park residents of their ability to maintain their current status while at the same time providing park owners with a fair return on their investment and the continuing ability to maintain their parks. (Ord. 4285, 1984.)

26.08.030 Definitions.

The following words and phrases shall have the meaning indicated, unless the context or usage clearly requires a different meaning.

A. CAPITAL IMPROVEMENT. Any addition or betterment made to a mobilehome or recreational vehicle park which consists of more than a mere repair or replacement of an existing facility or improvement and which has a useful life of five or more years.

B. CONSUMER PRICE INDEX. The Urban Wage Earners and Clerical Workers Index, Los Angeles-Long Beach-Anaheim average, all items, as published by the United States Bureau of Labor Statistics, or such other index as may be approved by resolution of the City Council.

C. DEPARTMENT. The Community Development Department of the City of Santa Barbara.

D. MOBILEHOME. As defined in Section 28.04.415 of this Code.

E. MOBILEHOME PARK. As defined in Section 28.04.415.1 of this Code.

F. MOBILEHOME PARK SPACE. As defined in Section 28.04.415.2 of this Code.

G. MOBILEHOME RESIDENT. A person who rents a space in a mobilehome park.

H. PARK OWNER. The owner or operator of a mobilehome or recreational vehicle park or an agent or representative authorized to act on said owner's or operator's behalf in connection with the maintenance or operation of the park.

I. RECREATIONAL VEHICLE. As defined in Section 28.04.468 of this Code.

J. RECREATIONAL VEHICLE PARK. As defined in Section 28.04.468.1 of this Code.

K. RECREATIONAL VEHICLE PARK SPACE. As defined in Section 28.04.468.4 of this Code.

L. RECREATIONAL VEHICLE RESIDENT. A person who rents a space in a recreational vehicle park.

M. REHABILITATION WORK. Any renovation or repair work completed on or in a mobilehome or recreational vehicle park which was performed in order to comply with an order of a public agency, or to repair damage resulting from fire, earthquake, or other causalty.

N. RENT. The consideration, including any bonus, benefits or gratuity, demanded or received by a park owner for or in connection with the use or occupancy of a space, including but not limited to monies demanded or paid for the following: meals where required by the park owner as a condition of the tenancy, parking, furnishings, other housing services of any kind, subletting, or security deposits. (Housing services are defined as those services connected with the use or occupancy of a space including, but not limited to, utilities (light, heat, water and telephone), utility connections, ordinary repairs or replacement and maintenance, including painting. This term shall also include the provision of laundry facilities and privileges, common recreational facilities, janitor service, resident manager, refuse removal, storage facilities and any other benefits, privileges or facilities.)

O. RESIDENT. A mobilehome resident and a recreational vehicle resident.

P. SPACE. A mobilehome park space and recreational vehicle park space.

Q. TENANCY. The right of a resident to use or occupy a space. (Ord. 4285, 1984.)

26.08.035 Exemptions.

This Chapter shall apply as of its effective date to all tenancies in mobilehome and recreational vehicle parks located in the City of Santa Barbara, except:

A. Tenancies used primarily for commercial purposes.

B. Tenancies in parks of four spaces or fewer, where one space is occupied by the park owner.

C. Tenancies in parks placed in operation after the effective date of this ordinance; provided, however, that such exemption shall continue in effect for only four (4) years after such creation.

D. Tenancies in spaces which a government agency owns, manages or operates.

E. Tenancies which both the park owner and the resident do not expect to exceed thirty (30) days. (Ord. 4285, 1984.)

26.08.040 Lease Provisions.

A lease shall include, at a minimum, the following provisions:

A. TERM; TERMINATION. No term shall be specified. The lease may be terminated only for one of the following reasons:

1. Failure of the resident to comply with a local ordinance or state law or regulation relating to mobilehomes or recreational vehicles within a reasonable time after the resident received a notice of noncompliance from the appropriate governmental agency.

2. Conduct by the resident, upon the park premises, which constitutes a substantial annoyance to other residents.

3. Failure of the resident to comply with a lease provision or reasonable rule or regulation of the park. No act or omission of the resident shall constitute such a failure to comply unless and until the park owner has given the resident written notice of the alleged violation and the resident has failed to adhere to the lease provision or rule or regulation within seven (7) days.

4. Nonpayment of rent, utility charges, or reasonable incidental service charges.

5. Condemnation of the park.

6. Change of use of the park, provided that the provisions of subsection f of Section 798.56 of the California Civil Code and any applicable local ordinances are followed.

7. Cessation of occupancy by the tenant with (i) sixty (60) days prior notice to the park owner, or (ii) waiver of such notice by the park owner.

B. NOTICE. Notice of termination must be given in writing in the manner prescribed by Section 1162 of the Code of Civil Procedure at lease (60) days prior to the termination date of the tenancy. Said notice shall state the date the lease terminates, the reason for the termination or refusal to renew, and the specific facts upon which the park owner is relying.

C. RENT INCREASES. A provision placing the following restrictions on a park owner's ability to increase the rent most recently and lawfully charged:

1. Rent for a space shall not be increased more frequently than once per year and all increases within any particular park shall occur at the same time each year.

2. Except as provided in Paragraph 3 of this Subsection C, a rent increase may not exceed the greater of (i) three-quarters of the percentage increase in the Consumers Price Index since the date of the last rent increase, or (ii) three (3) percent times the number of complete months since the date of the last rent increase divided by twelve.

3. A rent increase in excess of that allowed under Paragraph 2 of this Subsection C shall be allowed only to the extent it is approved by (i) the resident or (ii) an arbitrator acting pursuant to the provisions of Subsection D of this Section.

D. ARBITRATION. A provision establishing an arbitration mechanism for resolving disputes over (i) rent increase under Paragraph 3 of Subsection C of this Section, and (ii) any other issues which the parties agree to subject to arbitration. At a minimum, this provision shall specify as follows:

1. An impartial arbitrator shall be authorized to make final and binding decisions on disputed matters.

2. Arbitration shall be as expeditious as feasible and, whenever possible, should not exceed sixty (60) days from the date the arbitrator is selected to the date of the arbitrator's decision.

3. In the case of rent increase disputes:

a. The Department shall select a qualified arbitrator and shall prepare a contract to be executed by the arbitrator and park owner; and

b. The costs of the arbitrator shall be (i) paid by the park owner, and (ii) considered a reasonable operating expense within the meaning of clause (9) of Subparagraph d of this Paragraph 3 if the arbitrator approves the requested increase or any portion thereof; and

c. The arbitrator shall be authorized to examine all financial data relating to the park which is relevant to the dispute, and receive testimony (oral and written) from any affected resident of the park, the park owner or their representatives at a meeting open to all park residents affected by the proposed increase; and

d. The arbitrator shall approve such rent increase, if any at all, as is determined to be fair, just and reasonable within five days of the close of the arbitration hearing. The arbitrator's decision shall be mailed by the Department to the park owner and the affected residents or their designated representatives. In reaching that determination, the arbitrator shall consider the following factors, in addition to any other factors he or she considers relevant:

(1) Changes in the Consumer Price Index.

(2) The Voluntary Pay and Price Standards promulgated by the President of the United States or any other lawfully established state or federal government wage and price guidelines.

(3) The rent lawfully charged for comparable spaces in the County of Santa Barbara.

(4) The length of time since the last rent increase for the space or spaces specified in the rent increase proposal and the length of time necessary to receive consideration by the arbitrator.

(5) Any proposed capital improvements or rehabilitation work related to the space or spaces specified in the rent increase application, and the cost thereof, including such items as materials, labor, construction interest, permit fees and other items as the arbitrator deems appropriate.

(6) Changes in property taxes or other taxes related to the subject park.

(7) Changes in the rent paid by the park owner for the lease of the land on which the subject park is located.

(8) Changes in the utility charges for the subject park paid by the park owner and the extent, if any, of reimbursement from the residents.

(9) Changes in reasonable operating and maintenance expenses, including interest and other expenses relating to the acquisition of the land and improvements of the park.

(10) The need for repairs caused by circumstances other than ordinary wear and tear.

(11) A change in the amount and quality of services provided by the park owner to the affected residents.

e. The arbitrator shall not consider changes in operating or other expenses caused by the park owner's refinancing of the park occurring after the date of adoption of this ordinance, except where the refinancing is both reasonable and necessary to make capital improvements to the park or is the result of prior financial commitments specific to the park becoming due.

f. The arbitrator may provide that an increase in rent or a portion of an increase in rent granted by the arbitrator be limited to the length of time necessary to allow the park owner to reasonably amortize the cost of a capital improvement, including interest and a reasonable profit.

E. NO ASSIGNMENT. A provision stating that the lease is not assignable to a successor of the tenant in the absence of mutual consent of the parties. (Ord. 4285, 1984.)

26.08.050 Lease Negotiation; Arbitration.

A. MANDATORY PROVISIONS. The park owner shall offer each resident a lease which contains each of the provisions specified in Section 26.08.040, except to the extent that the parties have voluntarily agreed to modify or waive any such provision. The parties shall bargain in good faith to reach agreement on the language used to express the mandatory provisions, and shall submit any dispute which remains after such bargaining to arbitration as set forth in Paragraph C. These provisions shall be indentified in the lease as "mandatory provisions."

B. OPTIONAL PROVISIONS. The lease may contain any additional provisions to which the parties agree. Either party may propose inclusion of optional provisions. The parties shall bargain in good faith with respect to the inclusion of any such optional provisions and shall submit any dispute which remains after such bargaining to arbitration as set forth in Paragraph C. The arbitrator may impose on the parties any optional provisions which the arbitrator finds will render the lease reasonable, equitable and consistent with other leases commonly used in similar facilities. These provisions shall be identified in the lease as "optional provisions."

C. ARBITRATION. Any disputes arising between a park owner and resident under this Section shall be deemed submitted to arbitration upon the expiration of sixty (60) days after commencement of negotiations. Either party may request arbitration. The arbitrator shall be selected as set forth in Section 26.08.040,D. The costs of the arbitrator shall be paid by the park owner. One half of such costs shall be considered a reasonable operating expense under clause (9) of subparagraph d of Paragraph 3 of subsection D of Section 26.08.040. The arbitrator shall render a decision within thirty (30) days, and the decision shall be final and binding upon the parties. (Ord. 4285, 1984.)

26.08.060 Rent Increase Upon Transfer of Ownership.

If a space is voluntarily vacated by all the existing tenants as a result of a transfer of legal ownership of the mobilehome or recreational vehicle, and it is not removed from the space, then the rent may be increased by an amount not to exceed ten percent (10%). (Ord. 4285, 1984.)

26.08.070 Notices by Park Owner.

Within thirty days of the adoption of this ordinance, and upon the renting of each park space thereafter, a park owner shall give each resident a written statement advising the resident of the existence of this ordinance. The park owner shall also maintain a current copy of the ordinance available for review at the manager's premises or other convenient location within the park. (Ord. 4285, 1984.)

26.08.080 Enforcement.

A. RENT INCREASES. A park owner may not collect rent in excess of the rent most recently and lawfully charged for a park space until (i) a lease is executed by both parties with respect to that space, or (ii) a resident fails to execute a lease in a form approved by the arbitrator within thirty (30) days of the arbitrator's decision, which failure shall constitute a waiver by the resident of his or her rights under this Chapter.

B. COURT ORDER. Either party may bring an action in the Superior Court compelling the other party or the arbitrator to comply with the terms of this Chapter. Violation of this Chapter shall not be a misdemeanor, nor punishable by the imposition of civil penalties. (Ord. 4285, 1984.)

FILED

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Nunc pro tunc

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAMS C. HALL and JEAN G. HALL, Plaintiffs-Appellants, v. CITY OF SANTA BARBARA, Defendant-Appellee.	No. 85-5838 D.C. No. CV 84-9506 LEW AMENDED OPINION

Appeal from the United States District Court
For the Central District of California
Hon. Laughlin E. Waters, District Judge, Presiding

Argued Pasadena, California - March 5, 1986
Submitted - April 11, 1986
Filed: August 22, 1986; Amended March 9, 1987 Nunc pro tunc

Before: SNEED and KOZINSKI, Circuit Judges; and SOLOMON,*/ District Judge.

KOZINSKI, Circuit Judge.

We review the district court's dismissal of plaintiffs' lawsuit seeking compensation for an alleged taking of property resulting from the operation of Santa Barbara's mobile home rent control ordinance.

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*/ The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Facts

Williams and Jean Hall own and operate the Los Amigos Mobile Home Estates, a mobile home park within the City of Santa Barbara. They provide tenants a plot of land and access to certain amenities such as water and electricity. Tenants install mobile homes, paying rent for use of the land and facilities.

Mobile homes are mobile only in the sense that they are not permanently anchored to a foundation. However, many mobile homes have no wheels and bear no other close resemblance to a motor vehicle. Nevertheless, in California they must display motor vehicle license plates, Cal. Veh. Code § 5352 (West 1971 & Supp. 1986), and are considered personal property (exempt from real property tax). Cal. Rev. & Tax. Code § 5810 (West Supp. 1986).

While tenants are free to remove their mobile homes when they move, in practice they rarely do so. California law normally prohibits mobile park operators from forcing tenants to remove mobile homes. Cal. Civ. Code § 798.73 (West 1982 & Supp. 1986). Tenants typically sell their homes to buyers who then succeed them as tenants of the mobile home park.

In August 1984 the City of Santa Barbara enacted a rent control ordinance applicable to mobile home parks. Santa Barbara, Cal., City Council Ordinance No. 4285, ch. 26.08 (Aug. 14, 1984) (hereinafter S.B. Ord.) The ordinance requires mobile park operators to offer their tenants leases of unlimited duration. These leases must provide certain key terms: They must be terminable by

the tenants at will,[1/] but by the mobile home operator only for cause, narrowly defined by the ordinance;[2/] rent increases are strictly limited;[3/] and disputes about rent or lease terms are made subject to binding arbitration. S.B. Ord. § 26.08.040.

The Halls brought this action under 42 U.S.C. § 1983,[4/] claiming that the ordinance effected a taking of their property and that such taking was neither for a public purpose nor justly compensated. Plaintiffs' claim was a novel one: they argued that by giving tenants the right to a perpetual lease at a below-market rental rate, the ordinance transfers to each of them a possessory interest in the land on which their mobile home is located. Ac-

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1/ While this is not explicitly stated in the ordinance, it appears implicit in the regulatory scheme and has been so treated by the parties. See S.B. Ord. § 26.080.040A. As with much else on this record, we have to surmise what remedies the ordinance may give the landlord in case of a tenant's untimely termination of the lease.

2/ A lease may be terminated only for one of the following reasons: (1) failure to comply with a local or state mobile home regulation; (2) conduct that constitutes substantial annoyance to other residents; (3) failure to comply with lease provisions or reasonable park rules; (4) non-payment of rent, utility charges or reasonable service charges; (5) condemnation of the park; (6) change in use of the park in accordance with California Civil Code Section 798.56(f); (7) cessation of occupancy by the tenant. S.B. Ord. § 26.08.040A.

3/ A park owner may unilaterally increase the rent once a year by three percent or by three-quarters of the increase in the Consumer Price Index, whichever is greater. S.B. Ord. § 26.080.040C. If the owner seeks a larger increase, he must submit his request to arbitration. Id. § 26.080.040C, D. In addition, whenever the space becomes vacant, the landlord may raise the rent by up to 10%. In addition, whenever the space becomes vacant, the landlord may raise the rent by up to 10%.

4/ The City of Santa Barbara is a "person" amenable to suit under 42 U.S.C. § 1983. Owen v. City of Independence, 445 U.S. 622, 638 (1980).

cording to the Halls, this interest has a market value and a market: the market for mobile homes located in mobile home parks. According to the Halls, the price of mobile homes in their park shot up dramatically after enactment of the ordinance, with many selling far above their blue book value.[5/] They claim that the substantial premium paid for mobile homes in parks subject to the Santa Barbara Ordinance reflects the transfer of a valuable property right to occupy mobile home parks at below-market rates.

The City of Santa Barbara filed a motion to dismiss and the Halls filed an opposition.[6/] At a hearing held on April 15, 1985, the district court granted the motion.[7/] The Halls appealed.

5/ The blue book is the Kelley Blue Book for Manufactured Housing (Mobile Homes), published by the Kelley Blue Book Company of Costa Mesa, California. Like the similar blue book for automobiles, it is the standard reference for prices of mobile homes.

6/ Although the Halls' complaint was somewhat elliptical, the opposition to the motion to dismiss fairly advised defendant and the district court as to the nature of plaintiffs' claim. Under such circumstances, leave to amend the complaint, rather than dismissal, is the appropriate course of action. See Forman v. Davis, 371 U.S. 178, 182 (1962); Scott v. Eversole Mortuary, 522 F.2d 1110 (9th Cir. 1975). We believe the district court abused its discretion by dismissing rather than giving plaintiffs an opportunity to amend the complaint.

7/ Because the district court did not prepare a written opinion, we would have found it useful to review a transcript of the hearing on the motion to dismiss, and particularly the district judge's bench ruling. Unfortunately, neither party made a transcript available.

Discussion[8/]

It is axiomatic that "[t]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." 5 C. Wright & A. Miller, Federal Practice & Procedure, Civil § 1357, at 598 (1969).[9/] This admonition is perhaps nowhere so apt as in cases involving claims of inverse condemnation where the Supreme Court itself has admitted its inability "to develop any 'set formula'" for determining when compensation should be paid, Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978), resorting instead to "essentially ad hoc, factual inquiries" to resolve this difficult question. MacDonald, Sommer & Frates v. Yolo County, 54 U.S.L.W. 4782, 4784 (U.S. June 24, 1986); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). While dismissal of a complaint for inverse condemnation is not always inappropriate, such a dismissal must be reviewed with particular skepticism to assure that plaintiffs are not denied a full and fair opportunity to present their claims. See Whitney Benefits, Inc. v. United States, 752 F.2d 1554, 1558-60 (Fed. Cir.

8/ A dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is a ruling on a question of law and as such is reviewable de novo. Guillory v. County of Orange, 731 F.2d 1379, 1381 (9th Cir. 1984).

9/ "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). All allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. Sanders v. Kennedy, No. 84-6370, slip op. at 6 (9th Cir. July 14, 1986); North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 580 (9th Cir. 1983).

1985); Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 887 (Fed. Cir. 1983).

In adjudicating a claim such as that presented by the Halls the court must resolve three questions: (1) Did the governmental action amount to a taking of property? See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1000 (1984). (2) Did it advance a legitimate governmental interest? See, e.g., Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). (3) Was there just compensation? See, e.g., Kaiser Aetna, 444 U.S. at 179-80. If the first question is answered in the affirmative and either of the remaining two in the negative, plaintiffs prevail; otherwise they lose. In determining whether plaintiffs' case was properly dismissed, we examine each of these issues in turn, assuming, of course, that plaintiffs' allegations are all true.

1. Was There a Taking of Property?

Supreme Court cases addressing this question can be divided into two lines of authority:[10/] the so-called regulatory taking

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10/ The Court noted the existence of these two lines of authority in Loretto v. Teleprompter Manhattan CATV Corp.:

> Since these early cases, this Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the former situation.

458 U.S. 419, 428 (1982).

cases[11/] and the physical occupation cases.[12/] Regulatory taking cases are those where the value or usefulness of private property is diminished by regulatory action not involving a physical occupation of the property. A typical case of this sort is Penn Central Transportation Co. v. New York City, 430 U.S. 104 (1978), where New York City prohibited Penn Central from building a 55-story office tower over its Grand Central Terminal. Despite the drastic diminution in the value and usefulness of Penn Central's property, the Court held that the city's action did not amount to a taking.

Physical occupation cases are those where the government physically intrudes upon private property either directly or by authorizing others to do so. A typical case is Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), where New York City authorized Teleprompter to string 36 feet of one-half inch coaxial cable and place two switchboxes, all amounting to about one and one half cubic feet, on a private building. Despite the

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11/ E.g., United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455 (1985); Williamson County Regional Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108 (1985); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

12/ E.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Kaiser Aetna v. United States, 444 U.S. 164 (1979); United States v. Causby, 328 U.S. 256 (1946); Richards v. Washington Terminal Co., 233 U.S. 546 (1914).

minimal burden placed on the property owner, the Court in Loretto held that a taking had occurred.

As Penn Central and Loretto demonstrate, the Court reaches dramatically different results depending on whether it concludes that a particular governmental action amounts to a physical occupation of property or merely a regulation. See R. Epstein, Takings 49-50, 94 (1985) (hereinafter Epstein).[13/] As the Court explained in Loretto, the distinction lies in the fact that "a physical invasion [of property] is a government intrusion of an unusually serious character" for purposes of the taking clause. 458 U.S. at 433 (footnote omitted). Indeed, "a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine," id. at 432 (footnote omitted), and "without regard to the public interests that it may serve." Id. at 426. Elsewhere the Court noted that "when the 'character of the governmental action,' Penn Central, 438 U.S., at 124, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." Loretto, 458 U.S. at 434-35. See also Kaiser Aetna, 444 U.S. at 179-80 ("the 'right to exclude,' so universally held to be a fundamental element of the

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13/ Commentators have criticized this physical invasion/regulation distinction. See Epstein at 49-50; Blume & Rubinfeld, Compensation for Takings: An Economic Analysis, 70 Cal. L. Rev. 569, 574-75 (1984). Nevertheless, we are bound to respect the distinction as drawn by the Supreme Court.

property right, falls within this category of interests that the Government cannot take without compensation").

When viewed in the light most favorable to the Halls, the allegations of the complaint seem to present a claim for taking by physical occupation, as in Loretto, Kaiser-Aetna and their precursors. Reduced to its essentials, appellants' claim is that the Santa Barbara ordinance has transferred a possessory interest in their land to each of their 71 tenants; that this interest consists of the right to occupy the property in perpetuity while paying only a fraction of what it is worth in rent; and that this interest is transferable, has an established market and a market value. If proven, appellants' claims would amount to the type of interference with the property owner's rights the Court described so eloquently in Loretto. See Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875 (1983) (Rehnquist, J., dissenting from dismissal for want of substantial federal question).[14/]

The right to occupy property in perpetuity is surely the type of interest that is protected by the taking clause.[15/] See United

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14/ As appellee points out, Justice Rehnquist's lone dissent in Fresh Pond suggests that the other Justices did not share his ultimate conclusion that the rent control scheme there constituted a taking. However, as discussed below, see pp. 14-18 infra, Fresh Pond is distinguishable from this case in material ways that we presume were the basis for the majority's decision. We do not interpret the Fresh Pond dismissal as repudiating everything said by Justice Rehnquist in his dissent.

15/ Professor Michelman notes as follows in his seminal article on this subject:

> [t]he one incontestable case for compensation (short of formal expropriation) seems to occur

(footnote continues)

States v. General Motors Corp., 323 U.S. 373, 378 (1945). Moreover, certain features of the Santa Barbara ordinance, and the way it is alleged to operate, make it peculiarly susceptible to the claim presented by the Halls. Thus, the ordinance directs the landlord to give tenants a lease, a recognized estate in land, lasting indefinitely.[16/] Moreover, the landlord's residual rights in the property are largely at the mercy of his tenants; he loses practically all right to decide who occupies the property, and on what terms. If a tenant moves, the tenant alone decides who will be his successor by selecting the buyer for his rental unit; the landlord has no meaningful say as to who will live on the property, now or in the future.

Moreover, because of the way the ordinance is alleged to operate, the tenant is able to derive an economic benefit from the statutory leasehold by capturing a rent control premium when he

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(footnote continued)
when the government deliberately brings it about that its agents, or the public at large, "regularly" use, or "permanently" occupy, space or a thing which theretofore was understood to be under private ownership.

Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1184 (1967), quoted with approval in Loretto, 458 U.S. at 427 n.5.

16/ S.B. Ord. § 26.080.050A. We find entirely unpersuasive the city's argument that the ordinance does not give tenants any rights in the landlord's property because the parties are free to change the terms of the lease by mutual consent. That tenants may waive the rights provided for them by the ordinance does not render those rights any less real or valuable. Presumably tenants forego a statutory lease only if the landlord offers them something better. A right is no less a right because it can be traded for something else. Indeed, the contrary is true.

sells his mobile home. In effect, the tenant is given an economic interest in the land that he can use, sell or give away at his pleasure; this interest (or its monetary equivalent) is the tenant's to keep or use, whether or not he continues to be a tenant. If the Halls' allegations are proven true, it would be difficult to say that the ordinance does not transfer an interest in their land to others. See also pp. 15-17 infra.

Loretto's explanation as to why a physical invasion of property is such a serious interference with the property owner's rights strongly supports the Halls' claim that they suffered a taking:

> Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." United States v. General Motors Corp., 323 U.S. 373, 378 (1945). To the extent that the government permanently occupies physical property, it effectively destroys each of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. See Kaiser Aetna, 444 U.S., at 179-180; see also Restatement of Property § 7 (1936). Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, see Andrus v. Allard, [444 U.S.,] at 66, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied

> space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Loretto, 458 U.S. at 435-36 (emphasis original; footnote omitted).

Appellee's arguments supporting the district court's dismissal are not persuasive. Thus, it does not matter that the tenants' right to occupy space in the Los Amigos Home Estates is not truly perpetual because the ordinance might someday be repealed. A governmental taking can always be undone if the government so chooses. That has never defeated a taking claim. See, e.g., cases cited nn. 11 & 12 supra. See also San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 656-57 (1981) (Brennan, J., dissenting).[17/] Nor does the fact that tenants may be removed for

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17/ Two commentators have addressed a closely related problem in the following terms:

> The Supreme Court . . . holds that it is the rights of the property owner, not the rights of the property, that have significance.
>
> To account for those rights, one must abandon abstract calculations which obfuscate the problem by attempting to relate use prohibitions for periods of years to the perpetual life of the realty. Instead, one must examine the hardship placed on individuals by such actions. Sometimes delay in ability to use property leads to foreclosure. Sometimes the owner dies. Given the reality of inflation, the cost of developing the property may increase. Real estate taxes continue to be demanded, often by the entity which is preventing the property from being used.

(footnote continues)

cause, see p.3 & n.2 supra, defeat the Halls' claim. The ability to remove tenants for cause may lessen somewhat the economic impact of the Santa Barbara ordinance; it does not change the fact that tenants are given an indefeasible right to possession so long as they pay the controlled rent and behave themselves.

Nor does it matter that the physical occupation here is by tenants and not by the City of Santa Barbara itself. The Court addressed this point in Loretto, holding that "[a] permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant." 458 U.S. at 433 n.9; see Epstein at 187. Also put to rest by Loretto is the notion that the physical occupation is not permanent where the landlord could evict the tenants by going out of business.[18/] The Court gave short shrift to this argu-

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(footnote continued)
Berger & Kanner, Thoughts on The White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property, 19 Loyola L.A. L. Rev. 685, 744-45 (1986) (emphasis original; footnotes citing examples omitted).

18/ In any case, we note some skepticism as to whether this is an option realistically available to the Halls. State and local laws seem to pose considerable obstacles to going out of the mobile park business. State law allows the mobile park owner to evict tenants in order to put the park to a different use only upon giving six months' notice; such notice may only be given after all necessary local permits have been obtained. Cal. Civil Code § 798.56(f). Santa Barbara in turn requires that a mobile home park owner obtain a permit to convert a park to another use. Santa Barbara, Cal., Municipal Code ch. 28.78.010 (1984). An applicant for such a permit must file a plan outlining the use to which the property is to be put, describing the impact of the removal on displaced residents, and disclosing the relocation assistance to be provided. Id. ch. 28.78.040. Any such plan must be approved by the city's Community Development Department. Id. ch. 28.78.050.

ment, noting that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." Loretto, 458 U.S. at 439 n.17.

The city's argument that appellants are adequately compensated by the rents they receive is irrelevant to the determination of whether a taking has occurred. See Troy Ltd. v. Renna, 727 F.2d 287, 300 (3d Cir. 1984). Whether compensation is adequate is an inquiry separate from whether there has been a taking. In Loretto, for example, state law provided for compensation. The Court nevertheless determined that there was a taking through physical occupation. It left it to the state courts to determine whether the compensation provided was adequate. 458 U.S. at 441. We address this question below. See pp. 21-22 infra.

Finally, the city cites various cases,[19/] some of them decided since Loretto,[20/] where rent control statutes or ordinances have been upheld. Essentially, the city suggests that, whatever the applicability of taking law to other governmental actions, rent control is conclusively constitutional. We cannot agree. In

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19/ See, e.g., Block v. Hirsh, 256 U.S. 135 (1921) (upholding District of Columbia rent control ordinance as a temporary measure); Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948) (upholding rent limits on certain accommodations in "defense-rental areas" as a valid exercise of the war power).

20/ See, e.g., Fisher v. City of Berkeley, 105 S. Ct. 2653 (1985) (dismissing appeal of ruling that rent control statute need not provide landlord a reasonable return on his investment); Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875 (1983) (dismissing appeal of ruling upholding rent control statute limiting right to remove a tenant for personal use of rental unit); Troy Ltd. v. Renna, 727 F.2d 287 (3d Cir. 1984) (upholding New Jersey law prohibiting eviction of certain older tenants from apartments converted to condominiums).

light of the Supreme Court's own unwillingness to provide any hard and fast rules in this sensitive area, we cannot indulge the notion that a city may eviscerate a property owner's rights and shield its action from constitutional scrutiny by calling it rent control.[21/]

We have examined the cases cited by the city and find them distinguishable in a way we think the Supreme Court would find material. In none of the cited cases has the landlord claimed that the tenant's right to possess the property at reduced rental rates was transferable to others, that it had a market value, that it was in fact traded on the open market and that tenants were reaping a monetary windfall by selling this right to others.

This is not a minor difference; it is crucial. The fact that the tenant can sell his interest to third parties drastically affects the economic realities of the landlord/tenant relationship. The typical rent control statute modifies the landlord/tenant relationship somewhat to protect tenants from perceived evils of the

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21/ Troy Ltd. v. Renna, 727 F.2d 287 (3d Cir. 1984), does contain language suggesting that a rent control ordinance can never constitute a taking because occupancy of the property by tenants is a private rather than a public use for purposes of the taking clause. Id. at 301-03. This attempt to distinguish Loretto was effectively overruled by Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), which squarely held that transferring property "in the first instance to private beneficiaries does not condemn that taking as having only a private purpose." 467 U.S. at 243-44.

In any case, Troy must be read in light of its facts, which are materially distinguishable from ours. See, e.g., n.22 infra. Despite the broad language used in the opinion, we doubt that the Troy court would conclude that government may take private property from one person and give it to another without implicating the taking clause.

free-enterprise system. But see n.26 infra. By contrast, the Santa Barbara Ordinance, as it is alleged to operate, changes the fundamental relationship between the parties, giving landlord and tenant complementary estates in the same land. On the one hand, the landlord loses forever a fundamental aspect of fee simple ownership: the right to control who will occupy his property and on what terms. On the other hand, the tenant gets an interest that he can liquidate and take with him when he leaves the property, or even the City of Santa Barbara.

That tenants normally cannot sell their rights in rent controlled property provides important safeguards for landlords. Tenants, like the rest of us, are not immortal; nor are they immune to the normal familial and economic pressures that occasion vacancies even in rent controlled housing.[22/] If they are denied the right to cash out, tenants can enjoy the benefits of rent control only so long as they remain tenants, not beyond. When the premises become vacant, the landlord is able to reassert a measure of control over the property. He may chose to occupy it himself; or to allow a friend or relative to stay there; or to keep it vacant; or make improvements in the hope of raising the rent to the extent allowed by law; or to rent it to a new tenant, presum-

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22/ This was a key point supporting the court's conclusion that no taking had occurred in Troy, a case on which the city relies heavily. Troy noted that "[m]ost tenants with a protected status will be 70 years of age (or, if surviving spouses, 58 years of age) before the Tenancy Act comes into play. It is fanciful to imagine that these tenants will occupy their units 'permanently.' Moreover, the tenancies may terminate by virtue of changing income levels or principal residences, and tenants may be evicted on any of thirteen grounds." 727 F.2d at 301.

ably making the selection on the basis of factors that will maximize his total return from the property.[23/] Between tenants, the landlord can thus assert important prerogatives as property owner and make significant decisions as to the property's use. The tenant, for his part, must make difficult choices: if he wants the benefits of the rent control ordinance, he must stay put. If he wants to leave, he must give up a good thing.[24/]

23/ Even if the property owner may not increase his monetary income by raising the rent, his choice of tenants may increase his economic return in some other fashion. Thus, he may choose tenants with smaller families over those with larger ones, on the theory that fewer people place less of a strain on the mobile park's resources. For similar reasons, he may prefer families without pets and those where the breadwinner travels a lot. On the theory that frequent vacancies increase his control over the property, or allows for faster rent increases (see S.B. Ord. § 26.080.060), he may well prefer older tenants to younger ones.

In addition to selecting on the basis of factors that enhance his economic return, the landlord may also select on the basis of noneconomic factors that nevertheless increase the total benefit he derives from the property. See A. Alchian & W. Allen, University Economics 146 (3d ed. 1972) (hereinafter Alchian & Allen). Thus, landlords may select attractive pleasant applicants over slovenly belligerent ones, and nonsmoking teetotalers over smokers who drink.

The landlord's ability to exercise these choices with respect to the property is an important attribute of ownership and allows him to retrieve, in some measure, the monetary loss he suffers as a result of rent control. To the extent these choices are narrowed or eliminated altogether, the burden on the landlord is increased and his essential attributes of ownership are eroded until they become illusory.

24/ The inability of tenants to transfer rights in rent controlled property no doubt creates market inefficiencies. See Alchian & Allen at 154; P. Samuelson & W. Nordhaus, Economics 393-94 (12th ed. 1985); Muth, Redistribution of Income Through Regulation in Housing, 32 Emory L.J. 691, 694-95 (1983). However, "[n]othing in economic analysis warrants a judgment about which allocative procedures are good or bad. That judgment must be based on criteria derived from other sources." Alchian & Allen (footnote continues)

In short, under a rent control scheme where the tenant is not allowed to monetize his rights, benefits and burdens are shifted somewhat between landlord and tenant, but neither gets the full bundle of sticks. By contrast, as the Santa Barbara ordinance is alleged to operate, landlords are left with the right to collect reduced rents while tenants have practically all other rights in the property they occupy. As we read the Supreme Court's pronouncements, this oversteps the boundaries of mere regulation and shades into permanent occupation of the property for which compensation is due.

(2) Did the Ordinance Substantially Advance a Legitimate State Interest?

We first note a potentially significant difference in the standard by which governmental action must be adjudged depending on whether it is a deliberate exercise of the eminent domain power or regulatory action that results in an incidental taking. In Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), the Court explored the meaning of the "public use" requirement in the fifth amendment's eminent domain clause. The Court held that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers." 467 U.S. at 240. The Court also held that it would not "substitute its judgment for a legislature's

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(footnote continued)
at 154. Here, the very fact of the inefficiency--that the tenant is not given too great a stake in the property--saves most rent control schemes from potential unconstitutionality. After all, efficiency would be maximized by giving the tenant a fee simple interest in the property.

judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" 467 U.S. at 241 (quoting United States v. Gettysburg Electric R.R., 160 U.S. 668, 680 (1896)).

The Court in Midkiff did not address the somewhat different articulation of the standard applicable in cases where there was no deliberate exercise of the eminent domain power. For example, it did not mention Agins v. City of Tiburon, 447 U.S. 255 (1980), where it had noted that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . ." Id. at 260 (citing Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928)); see also United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455, 459 (1985) (citing Agins); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68 (1981) (same). The Midkiff Court left open the possibility that less deference would be afforded where government does not intend to effect a taking than where it does. See Midkiff, 467 U.S. at 241 (distinguishing Missouri Pacific R.R. v. Nebraska, 164 U.S. 403, 416 (1896), on the ground that "the 'order in question was not, and was not claimed to be [emphasis original], . . . a taking of private property for a public use under the right of eminent domain'").[25/]

25/ It makes considerable sense to give greater deference to the legislature where it deliberately resorts to its eminent domain power than where it may have stumbled into exercising it through actions that incidentally result in a taking. In the former case, the court is validating the will of the legislature; in the latter, it may be thwarting the legislative will by ordering com-
(footnote continues)

Even under the deferential Midkiff standard, public use is not established as a matter of law whenever the legislature acts. While the scope of judicial scrutiny is narrow, "[t]here is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power." Midkiff, 467 U.S. at 240. The test appears to be whether the legislature chose an objective that is within its authority under the police power, and whether it "rationally could have believed that the [Act] would promote its objective." 467 U.S. at 242 (emphasis original) (quoting Western & Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648, 671-72 (1981)). The test in inverse condemnation cases may well be more stringent.

Here, the Santa Barbara City Council enacted the ordinance to alleviate what it perceived as "a critical shortage of low and moderate income housing." S.B. Ord. § 26.08.020A. If appellants' allegations are substantiated, there would be significant doubt whether these purposes are achieved, or could rationally be thought achievable, by means of the ordinance.

If appellants are able to prove their allegations, it would seem that the Santa Barbara ordinance will do little more than give a windfall to current mobile park tenants at the expense of current mobile park owners. If, as appellants allege, the ordi-

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(footnote continued)
pensation where the legislature had no intention of engaging in a compensable transaction.

nance has resulted in a substantial increase in the market price of mobile homes subject to the ordinance, this may well hinder rather than assist lower-income families seeking access to rental units in mobile park homes. We express no view on this score; we merely hold that the issue must be considered and addressed by the district court on the basis of a complete record.[26/]

(3) Was Adequate Compensation Paid?

The adequacy of compensation, if any, paid to appellants is yet another inquiry fraught with factual uncertainty. The city would short-circuit this process by arguing that appellants are adequately compensated because they are entitled to rent that assures them a fair return on their investment. That, however, is not the test in cases involving a claim of taking by physical invasion, as opposed to mere regulation. For example, Mrs. Loret-

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26/ We also note what appears to be a growing consensus that "rent control causes a reduction in the quality of the existing rental housing stock and discourages investment in new rental property," actually exacerbating the problems it is intended to ameliorate. The Report of the President's Commission on Housing 91 (1982). See, e.g., P. Samuelson & W. Nordhaus, Economics 393-94 (12th ed. 1985); W. Baumol & A. Blinder, Economics: Principles and Policy 62-64 (3d ed. 1985); Muth, supra note 24, at 693-98; cf. Frey, Pommerehne, Schneider & Gilbert, Consensus and Dissension Among Economists: An Empirical Inquiry, 74 Amer. Econ. Rev. 986, 988, 991 (1984) (fewer than 2 percent of United States economists surveyed at random generally disagreed with the proposition that "[a] ceiling on rents reduces the quantity and quality of housing available"); see also Rent Control's Big Dilemma, San Francisco Chron., Feb. 28, 1986, at 76, col. 1. The rationality of rent control vel non may have to be reassessed in light of this growing body of thought on the subject. Cf. Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 54 U.S.L.W. 4319, 4323 (U.S. March 26, 1986)(reexamining inference to be drawn in predatory pricing cases in light of recent law and economics commentary on the subject).

to's claim was not defeated because she continued to collect rents on the apartment building upon which the cable was strung. See Loretto, 458 U.S. at 442.[27/]

Here, the rental payments compensate the Halls for use of the land during the rental period, plus whatever amenities they provide tenants. However, if their claim is substantiated, the Halls are entitled to additional compensation for the taking of their property: the possessory interest in the land allegedly transferred to each of their tenants. It may well be that the rental payments (together with such increases as are permitted under the ordinance) adequately compensate the Halls for the taking of their property. However, this cannot be assumed; it must be proven.. To make this determination, the court must ascertain the value of the interest allegedly transferred to each tenant and the value of what the Halls received, if anything, in addition to normal rental payments. All these are matters that must be considered by the district court on remand.[28/]

27/ The cases appellee cites, e.g., Agins, 447 U.S. 255, and Penn Central, 438 U.S. 104, stand for the proposition that the existence of residual economic value in the property defeats a taking claim where a regulatory taking is alleged. This rationale simply does not apply to cases involving a taking by physical occupation.

28/ The city also argues that the Halls' claim is premature, citing Williamson County Regional Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108 (1985). It is not clear what the city would have the Halls do to perfect their claim. Unlike Williamson and the more recent case of MacDonald, Sommer & Frates v. Yolo County, 54 U.S.L.W. 4782 (U.S. June 25, 1986), the Halls have no further administrative recourse available; there is nothing they may do under the Santa Barbara ordinance that would exempt them from its reach or cut off the rights they claim tenants (footnote continues)

Conclusion

Because there has been no trial, we cannot and do not express any view as to whether the Santa Barbara ordinance constitutes a taking. We hold only that, on the facts alleged, it may, and that at this stage we are unable to resolve this fact-bound issue. In such circumstances, the motion to dismiss was improvidently granted and we remand the case to the district court for further proceedings consistent with this opinion.

(footnote continued)
now have in their land.

Williamson and MacDonald were regulatory taking cases, not physical invasion cases. By their nature, regulatory taking cases are not ripe for constitutional adjudication until the governmental authority has had its final say, thereby defining precisely what (if anything) was taken. As the Court said in MacDonald, "[u]ntil a property owner has 'obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property,' 'it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interest ha[ve] been destroyed.'" 54 U.S.L.W. at 4784 (quoting Williamson, 105 S. Ct. at 3118 n.11). This, of course, is the test in regulatory taking cases, not physical invasion cases.

The inapplicability of the Williamson/MacDonald line of cases underscores the difference between this case and the regulatory taking cases on which the city relies so heavily. Where there has been a physical invasion, the taking occurs at once, and nothing the city can do or say after that point will change that fact.